

10-1-2006

## Building on Strong Foundations: Rethinking Legal Education with a View to Improving Curricular Quality

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### Recommended Citation

Veronica Henderson, "Building on Strong Foundations: Rethinking Legal Education with a View to Improving Curricular Quality" (2006) 29:2 Dal LJ 491.

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*Recent increases in law school tuition provide an occasion for critical reflection on precisely what law students are being offered in their formal education. The aim of this article is to help catalyze discussion of what quality legal education entails. It begins by outlining the current underpinnings of Canadian legal education, especially the foundation of issue identification. Newer developments in legal education are also canvassed. A foundational critique is then applied to elucidate the main weakness of the present curricular structure: students are graduating with a flat understanding of the law. Employing Dr. Oliver Sacks's critique of medical education as a starting point, the author proposes a vision of a re-invigorated legal curriculum built on twin foundations of identification and understanding. It is suggested that legal educators might, in practice, build on the foundation of understanding by addressing four key areas in which the traditional curriculum shows weakness: client understanding; comprehension of the law in a broader context; understanding of the actors and institutions of the justice system; and self-knowledge. Practical teaching tips are offered to encourage the formation of more well-trained, well-rounded graduates better able to serve society upon graduation.*

*Les augmentations récentes des frais de scolarité dans les facultés de droit offrent une occasion de réflexion critique sur ce qui est offert aux étudiants en droit comme formation institutionnelle. L'objectif de cet article est de provoquer la discussion sur ce que comporte une éducation juridique de qualité. L'auteur mentionne d'abord ce qui constituent les piliers actuels de l'éducation juridique, en particulier le fondement de la détermination des enjeux. Les plus récents développements dans le domaine de l'éducation juridique sont aussi examinés. Une réflexion critique fondamentale est alors utilisée pour faire ressortir les principales faiblesses de la structure du programme d'études actuel : lorsqu'ils obtiennent leur diplôme, les étudiants ont une compréhension linéaire du droit. S'inspirant de la critique formulée par le Dr Oliver Sacks sur l'éducation médicale, l'auteur propose un programme revitalisé d'éducation juridique fondé sur la détermination et la compréhension des enjeux. Il est suggéré que les professeurs de droit pourraient, dans la pratique, partir de la base que constitue la compréhension pour aborder les quatre principaux secteurs où le programme traditionnel montre sa faiblesse : compréhension des clients; compréhension du droit dans un contexte large; compréhension des joueurs et des institutions du système de justice; et connaissance de soi. L'auteur offre des conseils pratiques pour l'enseignement afin d'encourager la formation de diplômés mieux formés et ayant des connaissances bien équilibrées, capables de servir la société lorsqu'ils quitteront l'université.*

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\*B.A. (Hons.) (McGill University), J.D. (University of Toronto). I am very grateful to Andrew Ashenurst, Robert Leckey, and Francine Ponomarenko for their insightful comments on earlier drafts of this article, and for their encouragement and support. I am also grateful to an anonymous reviewer at the Dalhousie Law Journal for constructive feedback and probing questions.

### *Introduction*

- I. *Contemporary legal education: traditional foundations and newer developments*
  1. *Mastery of identification skills: the foundation of law school*
  2. *Two newer developments in law school education*
    - a. *The bridled influence of perspectives courses*
    - b. *The seductiveness of coverage*
- II. *Marshalling a foundational critique*
  1. *Foundational critique in the legal context*
  2. *Foundational criticism in a broader context and the medical school example*
- III. *Twin foundations of identification and understanding: a way forward*
- IV. *Imagining a re-invigorated curriculum: building on the foundation of understanding*
  1. *Client understanding*
  2. *Understanding the law in a broader context*
  3. *Understanding the institutions and actors of the justice system*
  4. *Understanding yourself: in law school and beyond*

### *Conclusion*

### *Introduction*

Canadian legal education today is increasingly taking on the attributes of a product for sale. The conception of legal education as commodity stems in part from government funding cuts to post-secondary education, which commenced in the early 1990s. Law schools filled the funding gap by vigorously escalating tuition fees, encouraging the notion of legal education as market product.<sup>1</sup> The notion of legal education as article of merchandise has also evolved in a broader social context, wherein Canadian citizens increasingly operate in the public sphere as consumers. The widespread consumer mindset among prospective law students and their parents has been evidenced by the popularity of the *Maclean's*

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1. The University of Toronto Faculty of Law is a frontrunner in boosting tuition, raising fees in 2003 to \$16,000 per academic year. The Faculty planned to increase the annual fee to \$22,000 by 2006: Kevin Marron, "Debt weighing on grads: Post-secondary education costs deter many would-be professionals" *The Globe and Mail* (21 July 2003) B12. The explosive debate over tuition increases, however, prompted Ontario Premier Dalton McGuinty to freeze tuition fees for two years beginning in September 2004.

magazine law school survey, which strove to be the ultimate buyers' guide to law school.<sup>2</sup>

While legal education is increasingly marketed as a product, public discourse on the issue of quality in legal education has become sadly stunted. Consider, for example, the debate on tuition deregulation. On one side, proponents consider high tuition a sound investment, as students shouldering debt today will be the "high earners of tomorrow."<sup>3</sup> On the other side, critics of fee hikes point out that new graduates "hobbled with debt" as they begin careers may disproportionately seek out work in big cities and high-paying areas of specialization, or leave the country altogether.<sup>4</sup> Critics also argue that prospective students—particularly those belonging to Aboriginal or other minority groups, as well as students from low-income or single-parent families—may be deterred from even attending professional school due to the "sticker shock" of high fees.<sup>5</sup> Unfortunately, the two sides in the tuition debate appear to have glossed over a critical issue. While supporters of fee hikes maintain that students are now "getting a very high quality of education"<sup>6</sup> for their dollar, and opponents claim the hikes are "not about providing a better quality of education,"<sup>7</sup> neither camp has elucidated what, precisely, is the meaning of the high quality professional education for which students must now pay more. This vacuum in the discourse is deplorable. Raising tuition without a rigorous re-evaluation of curricular quality spells missed opportunity: students pay more, but may fail to benefit from an invigorated curriculum; society may lose the chance to enjoy the services of better trained, well-rounded professionals.

The *Maclean's* survey similarly did little to advance our understanding of quality in legal education. The survey itself suggested that a law school provided quality education if it ranked highly in a number of the survey's fifteen categories. Categories addressed subjects such as library facilities, computer facilities, student-teacher ratio, incoming students' LSAT scores

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2. "Judging Canadian Law Schools" *Maclean's* (6 October 1997) 13. The 6 October 1997 issue of *Maclean's* was one of the "most profitable" in the history of the magazine: Constance Backhouse, "The Changing Landscape of Canadian Legal Education" (Excellence, Competition, and Hierarchy: Workshop on the Future of Canadian Legal Education, Faculty of Law, University of Manitoba, 3-4 May 1999), online: University of Manitoba Legal Research Institute <[http://www.umanitoba.ca/faculties/Law/LRI/Legal\\_education/backhouse.htm](http://www.umanitoba.ca/faculties/Law/LRI/Legal_education/backhouse.htm)>.

3. Adam Grachnik & Ned Richardson-Little, "First Martin budget hammered by education experts" *McGill Daily* (29 March 2004), online: McGill Daily Online, <<http://www.mcgilldaily.com/view.php?aid=2625>>.

4. Marron, *supra* note 1.

5. *Ibid.*

6. *Ibid.*

7. Letter from Ken Marciniak & Mohamad El-Hage to Osgoode Hall Law Students (5 March 2004) (copy in possession of author).

and grade point averages. The category subjects involved quantifying data for the statistical survey format: computers were counted and grade point averages tabulated. Very few of the survey categories, however, purported to address fundamental questions about the curriculum: "What are we teaching?" and "How are we teaching?"<sup>8</sup> The *Maclean's* survey, by its very nature, had to gloss over such open-ended questions: a statistical approach is hard-pressed to answer them.

The *Maclean's* law school survey had a striking, contagious effect on legal education discourse. The quantitative ethos of the *Maclean's* survey encouraged students and legal educators alike to spend less time discussing what is being taught and why, and more time discussing business models of law school competition and quantifiable improvements which law schools can undertake. When the University of Ottawa Faculty of Law engaged in a decanal search, for instance, students were predominantly concerned about what the new dean would do to improve the school's *Maclean's* ranking.<sup>9</sup> Alumni, meanwhile, funnelled donations into law school refurbishments which are easily quantifiable, such as "the construction of large edifices to house something, generally books."<sup>10</sup> Even the 'Most Innovative' category of the *Maclean's* survey did not prompt schools to revisit the fundamentals of legal teaching in great detail; rather, schools contrived to find add-on projects like exchange programs or co-operative placements to be trumpeted in the survey as "new" or "one-of-a-kind."<sup>11</sup> In sum, the *Maclean's* law school survey contributed to cramping discussions of quality in legal education at a time when going to law school in Canada costs more than ever.

Today, however, the tide may be turning in favour of a more sophisticated understanding of what it means to provide quality legal education. Exacting critics have emerged to raise doubts about the statistical validity of the *Maclean's* survey,<sup>12</sup> and to question the appropriateness of Canadians adopting an "exaggerated caste system of law schools"<sup>13</sup> as seen

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8. Sanda Rodgers, "Legal Education: Is It In Crisis?" (Excellence, Competition, and Hierarchy: Workshop on the Future of Canadian Legal Education, Faculty of Law, University of Manitoba, 3-4 May 1999), online: University of Manitoba Legal Research Institute <[http://www.umanitoba.ca/faculties/Law/LRI/Legal\\_education/rogers.htm](http://www.umanitoba.ca/faculties/Law/LRI/Legal_education/rogers.htm)>.

9. *Ibid.*

10. *Ibid.*

11. Backhouse, *supra* note 2.

12. One law school dean counted old computers in storage and included them in the number of computers at the law school: Rodgers, *supra* note 8.

13. Consultative Group on Research Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply and Services, 1983) at 12.

in the United States.<sup>14</sup> Recently, eleven Canadian universities declined an invitation to participate in *Maclean's* yearly university rankings for undergraduate programs, citing concerns that the data is compiled in an oversimplified manner.<sup>15</sup> The law school survey relied on the same data compilation that is used in the undergraduate program survey. The time may thus be ripe to encourage an open, creative space where students and educators alike can ask more fundamental questions about quality in legal education: Why are we teaching what we teach? How can we provide students with an education that honours their human potential? These questions are important if we are concerned with the ability of students to fulfil their "function as citizens" in the public sphere upon graduation.<sup>16</sup>

I propose to address the above queries by focusing on the foundations upon which curricula are built. In Part I of the article, I begin by painting a picture of contemporary legal education. I describe the traditional foundations of today's legal curriculum, and also examine more recent curricular developments to determine their place within the traditional structure. In Part II, I offer a critique of the current curricular foundations. I discuss the limitations of the traditional curriculum for students and the society they will serve upon graduation. In Part III, I offer an alternative foundational structure upon which legal educators could build the curriculum of the future. The alternative foundational structure I propose is inspired by Dr. Oliver Sacks's suggestions for improvement in the medical school curriculum. In Part IV, I imagine what a legal curriculum founded on alternative foundations might look like in practice. Finally, I address some potential objections to the feasibility of curricular change. Although I argue that broadening the foundations of the curriculum may be the most promising route to better legal education, the ultimate aim of this article is to encourage public discourse on quality in legal education today. Under the current climate, legal education is increasingly approached as a market product, and an expensive one at that. Legal educators and others concerned with the development of law students as citizens able to serve

14. Backhouse, *supra* note 2; Rodgers, *supra* note 8. In the U.S., "school prestige" is directly related to survey rankings and is frequently "the determining factor" for students choosing among offers of admission: Mitu Gulati, Richard Sander & Robert Sockloskie, "The Happy Charade: An Empirical Examination of the Third Year of Law School" (2001) 51 J. Legal Educ. 235 at 238-39.

15. "11 universities bow out of Maclean's university rankings" *University of Toronto News @UofT* (14 August 2006), online: News @UofT <<http://www.news.utoronto.ca/bin6/060814-2502.asp>>.

16. Annie Rochette & W. Wesley Pue, " "Back to Basics"? University Legal Education and 21<sup>st</sup> Century Professionalism" (2001) 20 Windsor Y.B. Access Just. 167 at 186; Terrance Sandalow, "The Moral Responsibility of Law Schools" (1984) 34 J. Legal Educ. 163 at 167-68; Donald E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders for an Approach that Encourages Moral Development" (1996) 9 Can. J.L. & Juris. 111 at paras. 1-2, 42.

society will want to add their voices to the discussion of what it means to provide legal education that is a product of true quality.

I. *Contemporary legal education: traditional foundations and newer developments*

Most readers, particularly new graduates, will remember well the curriculum at the law school they attended. Nevertheless, it is important at this juncture to examine the foundations of the current curriculum. In this article, I present a re-evaluation of law schools' foundations; to do this, it is first necessary to know what foundations exist today. I also examine the effect of traditional foundations on student employment and well-being, highlighting cues pointing to the need for change. Finally, I examine two newer curricular developments which provide further clues about the timeliness of foundational re-evaluation.

1. *Mastery of identification skills: the foundation of law school*

Broadly speaking, the curriculum across Canadian law schools is quite standardized. A largely compulsory first-year curriculum is followed by a largely elective upper-year curriculum.<sup>17</sup> Law schools generally offer compulsory courses in seven subjects. The seven subjects, typically organized around a key thematic tradition of the common law (in Quebec, the civil law) are contracts, torts, real property, personal property, criminal law and procedure, and constitutional law (or an introductory course in public law). The compulsory courses are usually taught in first year, although some may be taught in upper years.<sup>18</sup> Other substantive "bread-and-butter" courses—family law, evidence, business organizations, tax law, wills and estates, labour and employment law, intellectual property law, environmental law, and so on—are typically taught as upper-year electives. Like first-year compulsory courses, these upper-year electives also have "solidly doctrinal content."<sup>19</sup>

As most graduates will recall, law professors rely heavily on the "case-law method"<sup>20</sup> of teaching in the first-year compulsory courses, and

17. Joost Blom, "Introduction: Looking Ahead in Canadian Law School Education" (1999) 33 U.B.C. L. Rev. 7 at para. 5.

18. Blom, *ibid.* at para. 5; Rochette & Pue, *supra* note 16 at 181-82. In Quebec law schools, one finds courses on contractual and extra-contractual obligations, instead of contracts and torts.

19. Rochette & Pue, *ibid.* at 181.

20. Stephen C. Halpern, "On the Politics and Pathology of Legal Education (Or, Whatever Happened to That Blindfolded Lady With the Scales?)" (1982) 32 J. Legal Educ. 383 at 384; David M. Becker, "Some Concerns About the Future of Legal Education" (2001) 51 J. Legal Educ. 469 at 474. The Socratic method is used much less frequently in Canadian law faculties than in their American counterparts.

also in many of the upper-year “bread-and-butter” electives.<sup>21</sup> Using the caselaw method, professors impart the foundational skill of today’s legal curriculum: the capacity to identify legal issues and corresponding legal rules. In class, professors assign a selection of readings primarily comprised of appellate court decisions, and teach students to analyze the judgments with a view to: (1) eliciting the story or facts of the case; (2) identifying within the story relevant legal issues; (3) discovering and mastering the rules and principles which apply to the legal issues; and, (4) understanding the court’s reasoning behind those rules and principles.<sup>22</sup> The crux of the exercise lies in identification: students spot the legal issue(s) in the case, and pinpoint the case holding. Once students have analyzed a number of appellate judgments in this manner, they practice more advanced identification skills. Professors present students with a hypothetical “set of abstracted facts”<sup>23</sup>: therein, the story may be reminiscent of, but not identical to, cases covered in class. Students must detect the relevant legal issues in the hypothetical. Drawing on their newfound knowledge of a particular body of law from reading appellate judgments, students must then identify the legal rules or principles to resolve the issues.

Broad-based professorial support for the pre-eminence of identification skills in the curriculum—also called “analytic skills”<sup>24</sup>—is evidenced by teachers’ affinity for setting fact pattern examinations. Usually open-book, and often worth one hundred per cent of a student’s grade in a course, the fact pattern exam contains one or more hypothetical sets of facts which students must analyze.<sup>25</sup> Graduates will recall—perhaps fondly, perhaps not—sitting hunched at an examination table, course summaries spread about, reading the examination hypothetical, spotting relevant legal issues, and citing the applicable rules or principles in the allotted time (usually three hours). Some professors do choose to grade students via research essay rather than fact pattern exam, or set an exam with both essay and fact pattern components. The essay format may provide students with more “scope for imagination and critique” than the fact pattern, but professors may prefer the latter because it takes less time to assess than a research

21. See generally Julie Macfarlane, “A Feminist Perspective on Experience-Based Learning and Curricular Change” (1994) 26 *Ottawa L. Rev.* 357 at 359, 362, 370 [Macfarlane, “A Feminist Perspective”]; Rochette & Pue, *supra* note 16.

22. Janet E. Mosher, “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35 *Osgoode Hall L.J.* 613 at 624; Becker, *supra* note 20 at 473; Halpern, *supra* note 20 at 384.

23. Mosher, *ibid.* at 626.

24. Becker, *supra* note 20 at 473, 486.

25. Rochette & Pue, *supra* note 16 at 188; Macfarlane, “A Feminist Perspective,” *supra* note 21 at 360, 368.



essay.<sup>26</sup> In the case of experienced, traditional professors, the importance of setting fact pattern exams may stem from the belief that analytic skills “distinguish the craft of lawyering”<sup>27</sup>; newer professors, meanwhile, may agree or may feel pressure to conform to the tradition of setting fact pattern finals.

For students, sound identification skills lead to good marks. Students able to master these skills with the greatest speed—in time for first-year finals—reap coveted employment rewards. Students with top grades at the end of first year stand to land prestigious summer jobs following the second year of law school, because job interviews are scheduled for the fall of second year. At that point, the only law school transcript candidates can show prospective employers is that of their first year grades.<sup>28</sup> Students covet these summer jobs, not only because the pay is good, but also because summer jobs can lead to an articling position with the same employer after graduation, and possibly to an associate position after call to the bar.<sup>29</sup> Meanwhile, students whose identification skills may not have fully blossomed by the end of first year, or whose primary skill set may lie elsewhere—in interpersonal relations, advocacy skills, or making links between law and society—can fold themselves a fleet of paper boats with the numerous rejection letters received from potential summer employers. Employers bear responsibility for these questionable hiring practices, but law schools have done little to disabuse students of the notion that early identification skill mastery has a determinant effect on their future. Furthermore, law schools have not, to date, worked with employers to devise a more reasonable hiring scheme. Ultimately, the frenetic drama of one hundred per cent issue-spotting finals in first year and their wide-ranging employment effects are preliminary signs suggesting weaknesses in a curriculum built primarily on the foundation of identification.

The effect of the traditional curricular set-up on the student psyche is also important to consider. Studies of law student well-being depict two diverging, but equally disconcerting, accounts of the student experience at law school. According to the first account, supported by both Canadian and American empirical research, students’ initial enthusiasm for law

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26. Margaret Thornton, “Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same” (1998) 36 Osgoode Hall L.J. 369 at 381.

27. Becker, *supra* note 20 at 473.

28. Judges hiring students for clerkships following graduation engage in an even more extreme hiring practice, making hiring decisions for *two years hence* based on students’ first year grades. See generally Gulati, Sander & Sockloskie, *supra* note 14 at 239. See also Alan Watson, “Legal Education Reform: Modest Suggestions” (2001) 51 J. Legal Educ. 91 at 92.

29. Rodgers, *supra* note 8.

school is quickly supplanted by feelings of distress and depression.<sup>30</sup> These disturbing changes persist “throughout law school.”<sup>31</sup> Students develop negative feelings due to the hyper-competitive, winner-takes-all atmosphere in which one hundred per cent finals can make or break job prospects.<sup>32</sup> Anecdotal evidence of law student distress is common: one student likened her attempt to reconcile feelings of disillusionment with law school to “the grief process”<sup>33</sup>; a law professor noted that a number of students at law school had come to resemble “the walking wounded.”<sup>34</sup>

More recently, Mitu Gulati, Richard Sander and Robert Sockloskie have marshalled empirical research to challenge the standard account of the depressed law student.<sup>35</sup> These authors concede that some students experience stress and depression in law school; their research suggests, however, that students’ depression “diminish[es] substantially” as law school progresses.<sup>36</sup> The emotional well-being, satisfaction, and optimism of third year law students are all “relatively high,” precisely because third-year students have largely disengaged from their education.<sup>37</sup> Many third-year students find law school “boring,”<sup>38</sup> are unconvinced of the value of class attendance,<sup>39</sup> or attend class under-prepared.<sup>40</sup> A University of Toronto law student conducted an informal survey for her school newspaper in which she reported similar results regarding law student well-being in third year. When asked “Which of the three years [of law school] was your favourite?” nearly half of students surveyed chose third year, disengagement

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30. G. Andrew Benjamin *et al.*, “The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers” (1986) *Am. B. Found. Res. J.* 225; Matthew M. Dammeyer & Narina Nunez, “Anxiety and Depression Among Law Students: Current Knowledge and Future Directions” (1999) 23 *Law & Hum. Behav.* 55, 61; Susan Daicoff, “Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism” (1997) 46 *Am. U.L. Rev.* 1337; Karin Helmers *et al.*, “Stress and Depressed Mood in Medical Students, Law Students and Graduate Students at McGill University” (1997) 72:8 *Acad. Med.* 708 at 710.

31. Lawrence Krieger, “Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence” (2002) 52 *J. Legal Educ.* 112 at 114 [Krieger, “Institutional Denial”]. See also Patrick J. Schiltz, “On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession” (1999) 52 *Vand. L. Rev.* 871.

32. Krieger, “Institutional Denial,” *ibid.*; Schiltz, *ibid.*; Kirsten Edwards, “Found! The Lost Lawyer” (2001) 70 *Fordham L. Rev.* 37.

33. Daisy Hurst Floyd, “Reclaiming Purpose – Our Students’ and Our Own” *The Law Teacher* (Spring 2003) 1 at 1-2.

34. Anonymous, “Making Docile Lawyers: An Essay on the Pacification of Law Students” (1998) 111 *Harv. L. Rev.* 2027 at 2027.

35. Gulati, Sander & Sockloskie, *supra* note 14.

36. *Ibid.* at 253-54.

37. *Ibid.*

38. Watson, *supra* note 28 at 92.

39. Deborah Maranville, “Infusing Passion and Context into the Traditional Law School Curriculum Through Experiential Learning” (2001) 51 *J. Legal Educ.* 51 at 51; Gulati, Sander & Sockloskie, *supra* note 14 at 243-44; Watson, *supra* note 30 at 92, n. 5.

40. Gulati, Sander & Sockloskie, *supra* note 14 at 244-45.

from school featuring prominently in their explanations.<sup>41</sup> Students wrote comments such as “did no work”; “no stress”; “less studying”; “pressure’s off”; and “light at end of tunnel.”<sup>42</sup> This evidence of student disengagement fits into the context of a hiring scheme in which first year grades are key to employment, third year grades are largely ignored by students’ future employers, and issue-spotting remains the dominant testing format in most substantive core courses.

While some law students may be happy and engaged throughout law school, the empirical evidence that many students are depressed or disengaged is indicative of a pressing morale problem among students. Moreover, students with long, listless faces are not undergoing a change of mood upon graduation and entrance into the profession; rather, studies show that many young lawyers are overworked and unhappy.<sup>43</sup> Patrick Schiltz has amassed persuasive evidence of young lawyer discontent, and argues convincingly that young lawyers working in big firms are at the highest risk for depression and anxiety.<sup>44</sup> Law schools, however, do little to warn students of the challenges of big firm life. Career counsellors in big city law schools often steer students towards large firms. Students may conclude that Bay Street employment is the choicest career path—the “mecca”—although it may not ultimately be suited to their personalities or life goals.<sup>45</sup>

The relationship between student malaise and the traditional curricular focus on issue identification suggests a weakness in the current curricular structure. Law schools are stressing and boring their students by placing the focus primarily on issue-spotting skills. Evidence of young lawyer malaise, meanwhile, may be linked to the fact that many law schools steer disproportionate numbers of students towards large firms for summer and articling positions. When the evidence of low morale among students is combined with unfortunate hiring practices that inflate the importance of early identification-skill mastery, the picture suggests law schools would

41. Beatrice Van Dijk, “Survey of the Graduating Class” *Ultra Vires* (19 March 2002).

42. *Ibid.* In the context of high tuition at the University of Toronto Faculty of Law, student disengagement takes on a disturbing hue. Toronto has implemented its fee hikes on a graded scale: students have thus typically paid higher fees in their last year than in their first. Year three is the most expensive, but ironically, is the year in which many students tune out.

43. See Martin Seligman, *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment* (New York: Free Press, 2002) at 177; Connie Beck, Bruce Sales & G. Andrew Benjamin, “Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers” (1995-96) 10 J.L. & Health 1; Schiltz, *supra* note 31 at 871.

44. Schiltz, *ibid.*

45. Buckingham, *supra* note 16 at para. 22.

do well to think seriously about the dangers of a curriculum focused primarily on identification skills.

## 2. *Two newer developments in law school education*

Although identification skills are the central foundation of the legal curriculum, a description of law school today would be incomplete without reference to two notable, newer trends in legal teaching. They are the rise of perspectives courses, and the popularity of coverage teaching. My aim here is to discuss the place of these newer developments in the context of a curriculum founded on analytic skills, and to examine the effects of these developments on traditional foundations. By virtue of this scrutiny, we may find further clues pointing to the timeliness of rethinking curricular foundations.

### a. *The bridled influence of perspectives courses*

Most Canadian law schools now offer students “perspectives courses” which provide critical perspectives on the law.<sup>46</sup> Examples include courses which examine the law from a feminist perspective or a critical race perspective. The appearance of perspectives courses can be traced back to the 1960s and 1970s,<sup>47</sup> decades marked by strong feminist and civil rights movements in North America. The social movements of the era encouraged the university community to examine the power of affluent white men in society. In the legal arena, scholars devoted to critical perspectives exposed society’s legal systems as bastions of established white male elites. While traditional legal education began from the premise of a legitimate justice system, perspectives scholars set out to unveil the law’s hidden injustices.

These legal scholars also catalyzed key changes within the law school. Most law professors today, for example, acknowledge that traditional legal education may have devalued or excluded the perspectives and experiences of women, persons with disabilities, and visible minorities.<sup>48</sup> Furthermore, Canadian law schools now reflect “more diverse public interests,”<sup>49</sup> not only by offering perspectives courses, but also by encouraging students to gain practical experience in school-run legal clinics, wherein students serve the legal needs of low-income citizens in the surrounding community

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46. I have adopted the nomenclature of Rochette & Pue in this regard: See Rochette & Pue, *supra* note 16 at 181.

47. See Gulati, Sander & Sockloskie, *supra* note 14 at 237.

48. “A Feminist Perspective,” *supra* note 21 at 359.

49. Leon Trakman, “Comments on the Changing Landscape of Legal Education” (Excellence, Competition, and Hierarchy: Workshop on the Future of Canadian Legal Education, University of Manitoba, Faculty of Law, May 3-4, 1999), online: University of Manitoba Legal Research Institute <[http://www.umanitoba.ca/faculties/Law/LRI/Legal\\_education/trak.htm](http://www.umanitoba.ca/faculties/Law/LRI/Legal_education/trak.htm)>.

who may also be marginalized on the basis of race, sex, or disability. Finally, legal scholars specializing in critical perspectives helped spur law schools to alter admission policies. Today, schools embrace diversity in a student body more reflective of Canada's population than in past decades. In particular, faculties now boast a balanced male-to-female student ratio;<sup>50</sup> many schools wish to "retain more students from diverse racial, cultural, and economic backgrounds";<sup>51</sup> the admission of law students with physical disabilities and students who are openly gay or lesbian is less unusual.

The developments described above, however, have not been "transformative in character"<sup>52</sup> for legal education. The addition of perspectives courses to the syllabus has been just that—an add-on, an extension, to a core model of education which has remained largely unchanged.<sup>53</sup> The formative first year curriculum—critical to students' summer job prospects—remains primarily an initiation into analytic skills. It is true that critical perspectives have influenced the first-year curriculum—to a degree. Some law schools have created mandatory "equity days" or a perspectives "bridge week" for first-year students.<sup>54</sup> A day or week of critical perspectives in two full semesters of class, however, is not drastic curricular alteration. Some changes have also been made to first-year course content. One popular first-year contracts casebook now contains a paragraph-long note alluding to feminist critique of contract law and contracts casebooks, and a six-page excerpt from a feminist critique on freedom of contract.<sup>55</sup> Considering the format of the rest of the casebook, however, these inclusions may be perceived simply as decoration. A more systematic incorporation of feminist analysis can be seen in a popular first-year criminal law casebook, which includes excerpts from feminist critiques of the adversarial system, as well as solid background on the history of rape and sexual assault laws.<sup>56</sup> In the preface, however, the

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50. Today, women in Canadian law schools form over half the student body: Ingrid Peritz & Caroline Alphonso, "Walking tall in the footsteps of a tragedy" *The Globe and Mail* (6 December 2004) A1-A2. See also Jonathan E. Glater, "Women Are Close to Being Majority of Law Students" *New York Times* (26 March 2001), online: Law School News <<http://lawschool.com/femalemajority.htm>>; Law Society of Upper Canada, "Females again outnumber males at Call to Bar" *Ontario Lawyers' Gazette* 7 (2003) 24; Irene Taylor & Stephanie Willson, "Carpe Diem! Canada's Top 25 Women Lawyers" *Lexpert* 4 (2003) 68 at 69.

51. Mosher, *supra* note 22 at 630.

52. Trakman, *supra* note 49.

53. See Trakman, *ibid.*; Mosher, *supra* note 22 at 630; Thornton, *supra* note 28 at 373.

54. See Macfarlane, "A Feminist Perspective," *supra* note 21 at 360.

55. John Swan, Barry Reiter & Nicholas Bala, *Contracts: Cases, Notes and Materials*, 6th ed. (Toronto: Butterworths, 2002) at 112-13, 772-78.

56. Don Stuart & Ronald J. Delisle, *Learning Canadian Criminal Law*, 9th ed. (Toronto: Carswell, 2004) at 72-80, c. 4 at 623ff.

authors of the text maintain that while development of critical perspectives is “key” to university education, “students need to be informed [about the law] before they can be truly critical.”<sup>57</sup> This position, common among professors, makes it difficult for the theories and critiques of perspectives scholars to be incorporated into the first-year curriculum in a truly in-depth, widespread and systematic manner. The argument that systematic incorporation of critical perspectives may actually help students better understand the law they are learning has not yet gained enough currency to transform the first-year curriculum. First-year courses may “assimilate a few anodyne notions” from critical perspectives scholars,<sup>58</sup> but mastering the analytic skills foundation in first year remains the key to getting good grades.

Data regarding upper-year elective course choice provides further evidence that the influence of perspectives courses is bridled. An empirical study on upper-year course choice conducted at the University of British Columbia Faculty of Law has revealed that the percentage of students who choose to take “only one or no” perspectives course has “increased over the years despite an increase in the number and range of perspective offerings.”<sup>59</sup> While upper-year students are presumably sufficiently informed about the law to bring a critical perspective to bear upon it, perspective courses remain “satellite”<sup>60</sup> courses without enough gravitational pull to entice large numbers of students. Instead, many students continue to select large, lecture-format classes with fact-pattern finals because these courses are allotted more credits than the newer alternatives, are deemed essential preparation for bar exams, and are considered important for landing a good job.<sup>61</sup> Furthermore, the degree to which Canadian law schools have added perspectives courses to the core curriculum varies widely from one institution to another.<sup>62</sup>

Finally, the content of perspectives courses may offer clues regarding the limited influence of these courses. While perspectives courses provide students with important historical insights into the law as it evolved in the hands of traditional elites, the courses are often long on theory and

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57. *Ibid.* at v.

58. Thornton, *supra* note 26 at 398.

59. Rochette & Pue, *supra* note 16 at 183.

60. Macfarlane, “A Feminist Perspective,” *supra* note 21 at 360.

61. Buckingham, *supra* note 16 at para. 22.

62. While the University of British Columbia Faculty of Law offers a “large selection” of perspectives courses, students at the University of Western Ontario Faculty of Law report a deeply traditional curriculum, with a notable absence of courses with names like “Law and Society,” and a “gaping hole in the curriculum” where perspectives courses could flourish: Rochette & Pue, *supra* note 16 at 184; Kirsten McMahon, “The Canadian Lawyer 2004 Report Card on Canadian Law Schools” *Canadian Lawyer* (January 2004) 19 at 22.

short on practical advice. Professors teaching perspectives courses have not, in the main, made systematic efforts to educate the newly diverse student body—a diverse student body which they or their predecessors lobbied for—about the challenges that lie ahead in navigating a profession exhibiting residual traits of institutional discrimination. A review of course descriptions for five feminist perspectives courses at five major Canadian law schools, for example, reveals that all courses have as their primary focus introducing students to the feminist theoretical critique of law.<sup>63</sup> Only Karen Busby of the University of Manitoba Faculty of Law notes, in her course description, that she will explore ideas about gender in the legal *profession*, as well as ideas about feminist legal theory. A feminist perspectives course could, however, be an ideal setting to educate law students about the challenges facing women upon graduation and call to the bar.<sup>64</sup> By discussing theoretical as well as practical issues with their students, perspectives scholars could serve as true role models for the next generation of lawyers. Furthermore, more students may elect to take perspectives courses if practical issues were canvassed along with theoretical concepts in the classroom.

In sum, perspectives courses are partly limited in their influence because they have generally been cleaved onto the core curriculum. Perspectives courses may also be restricting their own influence by

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63. Susan Boyd's course description for Women, Law and Social Change at the University of British Columbia Faculty of Law may be found online at <[http://www.law.ubc.ca/files/pdf/current/2006\\_2007/Course\\_Descriptions/Course\\_description\\_report.pdf](http://www.law.ubc.ca/files/pdf/current/2006_2007/Course_Descriptions/Course_description_report.pdf)>; Karen Busby's course description for Gender and the Law at the University of Manitoba Faculty of Law may be found online at <[http://www.umanitoba.ca/faculties/law/newsite/course\\_desc.php?courseNumber=45307](http://www.umanitoba.ca/faculties/law/newsite/course_desc.php?courseNumber=45307)>; Brenda Cossman's course description for Feminist Theory at the University of Toronto Faculty of Law may be found online at <[http://www.law.utoronto.ca/students\\_content.asp?docNo=575&itemPath=2/2/12/1/0&cType=coursespg](http://www.law.utoronto.ca/students_content.asp?docNo=575&itemPath=2/2/12/1/0&cType=coursespg)>; Louise Langevin's course description for Analyse féministe du droit at the University of Laval Faculty of Law may be found online at <<http://www.ulaval.ca/sg/CO/C1/DRT/DRT-17049.html>>; Jennifer Bankier's course description for Women and the Law – Introduction at the Dalhousie Law School may be found online at <<http://www.registrar.dal.ca/calendar/class.php?subj=LAW&num=2152>>.

64. Research suggests that women are sixty per cent more likely to leave the profession than their male counterparts. Other research suggests that women do not quit the law *per se* in higher numbers than men; rather, they leave high-paying private practice positions in droves for lower-paying government or in-house counsel work: Taylor & Willson, *supra* note 50 at 70; Fiona Kay, "Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec" (2002) 47 McGill L.J. 699 at 703; Fiona Kay, "Flight from Law: A Competing Risks Model of Departures from Law Firms" (1997) 31 Law & Soc'y Rev. 301 at 302; Joan Brockman, "'Resistance by the Club' to the Feminization of the Legal Profession" (1992) 7 C.J.L.S. 47 at 58-59. Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued* (New York: Henry Holt & Co., 2001) at 37; Glater, *supra* note 50; Elizabeth Church, "Why women leave law" *The Globe and Mail* (31 January 2001) B17. Part of the exodus from private practice may be explained by the fact that women continue to shoulder a greater proportion of domestic and childrearing obligations than men: see generally Crittenden at 24-26; Margot Gibb-Clark, "Lawyers show the burden of stress" *The Globe and Mail* (20 March 2000) M1.

focusing primarily or exclusively on theoretical issues; the practical issues raised by the increased numbers of members in the profession who are not white able-bodied men may be glossed over in perspectives courses. The bridled influence of perspectives courses is a sober reminder for legal educators that intense commitment and tactical momentum are needed to truly transform the law school curriculum. Transformational reforms to the foundations of the curriculum are unlikely to succeed through curricular tack-on programs.

b. *The seductiveness of coverage*

Law professors have traditionally used cases and statutes primarily as “vehicles” for teaching techniques of legal method and analysis—techniques such as issue-spotting, for example.<sup>65</sup> To learn legal analysis, students have always had to absorb a certain amount of legal information in the form of caselaw or statutes. An inherent risk thus exists that teachers will place a “premium” on the “accumulation of information” in the classroom, at the expense of legal analysis and critical thought.<sup>66</sup> Professors who transmit legal information to students as an end in itself are sufficiently numerous that their teaching approach has gained its own nomenclature: “coverage” teaching.<sup>67</sup> These professors turn the lecture into a high-speed recitation of styles of cause and attendant holdings and legal reasons. Students take frantic notes, but hardly practice any legal analysis in class. Advances in computer technology may be fuelling the rising popularity of coverage teaching.<sup>68</sup> The searchable computer database dramatically increased the number of cases and statutes accessible to the law professor, and the speed with which they may be accessed. Canada’s Quicklaw or the American Westlaw—now available in Web format—are updated on a daily basis to include the most current caselaw and statutes. The “breadth and complexity” of the law thus “increases” as each fresh cohort of law students receives a welcome speech from their dean.<sup>69</sup> The allure of up-to-the-minute information compels some teachers to try to “teach it all.”<sup>70</sup>

Coverage teaching, however, is problematic on a number of fronts. Given the swiftness with which new law proliferates, students subjected to coverage teaching are soon in possession of a vast body of out-of-date information and few skills with which to analyze new law. The sheer

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65. Charles Calleros, “Rules for Monica” *The Law Teacher* (Fall 2001).

66. See Macfarlane, “A Feminist Perspective,” *supra* note 21 at 377-78.

67. Calleros, *supra* note 65.

68. Macfarlane, “A Feminist Perspective,” *supra* note 21 at 378.

69. Buckingham, *supra* note 16 at para. 1.

70. Becker, *supra* note 20 at 476.



mass of material teachers transmit in a coverage-type lecture may force students to learn organization and memorization techniques, but the popularity of summary-swapping among students makes the deluge of caselaw and statutes in class less intimidating to the more-skilled student. Finally, coverage teaching turns the learning of identification skills into a "spectator sport."<sup>71</sup> Students watch and listen while the professor outlines the key issues in a case for them. Grading in coverage courses, however, continues to reflect students' ability to deploy identification skills—skills which students hardly practice with professorial guidance prior to the exam.<sup>72</sup> Only a select number of students will catch on to the exercise, without professorial guidance, in time for all-important first-year finals.<sup>73</sup> "Hiding the ball,"<sup>74</sup> meanwhile, or rewarding students best able to guess correctly at issue-spotting, is unfair. It is akin to setting an algebra exam in a mathematics course without practicing algebraic problems with students in class.

The popularity of coverage teaching in legal education today suggests a need to revitalize the identification foundation of the curriculum. Professors need to teach identification skills properly at the outset, and *throughout the semester*. Research suggests that law students routinely do better on fact-pattern exams when they know what is expected through the guided practice of hypotheticals before the final.<sup>75</sup> Professors aiming to impart solid identification skills would also do well to grade assignments throughout the term, instead of setting one make-or-break final. Prompt feedback facilitates learning, and allows the teacher to modify teaching methods during term to address a particular class's weaknesses.<sup>76</sup> Ultimately, teaching analytic skills properly is not only the fair thing to do; it may also help alleviate some of the distress law students experience at school.<sup>77</sup>

Revitalizing the identification foundation and stopping there, however, would be a disappointingly conservative remedy for today's legal curriculum. The problems discussed in earlier parts of this paper—low

71. *Ibid.* at 485.

72. See Rochette & Pue, *supra* note 16 at 188.

73. Becker, *supra* note 20 at 476.

74. Watson, *supra* note 28 at 91.

75. See Gary A. Negin, "The Effects of Test Frequency in a First-Year Torts Course" (1981) 31 J. Legal Educ. 673; Watson, *ibid.* at 92, n. 3.

76. Maranville, *supra* note 39 at 52, 71-73.

77. When I attended law school, a professor who devoted all but one lecture to coverage refused to glance at a single student's attempt to analyze a practice hypothetical before the final exam, citing time pressures and the unfairness of giving one student such attention without making it available to all. The peculiarity of this logic is that coverage teaching simply encourages *more students* to seek individualized attention and become vexed upon rebuff, because identification skills have not been practised in class but remain central to the exam.

student morale, questionable hiring schemes tied to one hundred per cent issue-spotting finals, and the limited influence of perspectives courses—are all clues pointing to the need to rethink the value of having only one central foundation for the curriculum. There is more to successful legal practice than well-honed identification skills. Even if students are fortunate enough to receive proper instruction in identification skills, they are still graduating without grounding in all the essentials, which include understanding of clients, of the law in a broader context, of the institutions and actors of the justice system, and of the self. Identification is simply insufficient as a foundation on which to build an entire curriculum.

## II. *Marshalling a foundational critique*

In this section, I employ what I call a *foundational critique*, the aim of which is to challenge the current underpinnings of legal education. I explore specific limitations of a curriculum founded primarily on identification skills. Furthermore, I examine the broader educational context in which foundational criticism exists. I also compare the legal and medical school curricula to illustrate the similar weaknesses that result from curricula founded primarily on identification skills.

### 1. *Foundational critique in the legal context*

I use the term foundational critique to describe legal education criticism directed at the underpinnings of the current legal curriculum. Scholars subscribing to a foundational critique have not to date given their ideas a formal name; they do not have the foothold in the mainstream curriculum (admittedly a peripheral foothold) that critical perspectives scholars do. There are, for example, no upper-year law classes entitled *Rethinking the Underpinnings of Our Curriculum*. Yet, scholars and legal educators have engaged in foundational criticism for a number of years. Alan Watson of the University of Georgia Law School, for example, provides a compelling summation of the cardinal trouble with a curriculum heavily focused on issue identification. According to him, it creates students who are “flat in their understanding of the law.”<sup>78</sup> Specifically, the traditional approach to learning leads to an inflexible “law school lock-step,”<sup>79</sup> where students lack “depth” in their grasp of issues and concepts.<sup>80</sup> Taken together, the research suggests that students display a flat, or thin, comprehension in at least four key areas; namely understanding the client; discerning the

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78. Watson, *supra* note 28 at 92, n. 4.

79. Kim Diana Connolly, “Mirror, Mirror: Using Non-Traditional Reflective Exercises” *The Law Teacher* (Fall 2001).

80. Watson, *supra* note 28 at 92, n. 4.

role of the law in a broader context; understanding professionals and institutions; and knowledge of the self.

First, the traditional casebook method of teaching, with its heavy reliance on appellate judgments, provides students with inadequate understanding of the “real flesh-and-blood human beings” who are engaged in the legal process, be they clients or witnesses.<sup>81</sup> Students are so focused on identifying legal issues and holdings that the true human drama of the legal case becomes obscured; from the tidy, academic vantage point of the appellate judgment on the student’s desk, the legal process takes on an illusory veneer of being “quite bloodless.”<sup>82</sup> The casebook method—with its lack of empathetic emphasis—may even indoctrinate students with an unconscious arrogance towards, and domination over, their future clients.<sup>83</sup> Furthermore, the high-stress, “constant demand” environment of many law firms may reinforce negative attitudes young lawyers learn in school, encouraging them to lose entirely the “capacity to really care about the people involved with the problems.”<sup>84</sup>

Second, the casebook method provides little context to the cases studied. Students rarely learn about the historical context, economic environment, social conditions and political regime in which an appellate decision was rendered<sup>85</sup>; Stephen Halpern has argued that the case method may even expressly “discourage” students from uncovering the broader context of a case.<sup>86</sup> This telescopic teaching is highly unfortunate, because social, economic, and political conditions often affect both the outcome and perceived justness of legal decisions.<sup>87</sup> Most students who take family law, for example, are familiar with the outcome in *Murdoch*.<sup>88</sup> Martland J. for the majority of the Supreme Court denied farm wife Irene Murdoch, who sought a divorce, any share in the ranch property she had worked equally with her husband for twenty-five years. More classroom attention, however, deserves to be devoted to the fact that *Murdoch* produced a “national outcry” spurred by the feminist movement of the era, and that the lone dissenting judge, Bora Laskin, “vaulted” to the position of Chief

81. Rt. Hon. Kim Campbell, “Twenty-First Century Ethics: The Challenge” (John Tait Memorial Lecture in Law and Public Policy, National Gallery of Ottawa, 4 December 2001).

82. Louis J. Sirico, “Ask Your Students” *The Law Teacher* (Spring 2001), online: Law Teacher Online <<http://law.gonzaga.edu/Programs/institute+for+law+school+teaching/The+Law+Teacher+-+Newsletter/Past+Issues+of+The+Law+Teacher/spring+2001/default.htm>>.

83. Mosher, *supra* note 22 at 627.

84. Lawrence Krieger, “What we’re not telling law students—and lawyers—that they really need to know: Some thoughts-in-action toward revitalizing the profession from its roots” (1998-99) 13 *J. Law & Health* 1 at 17.

85. Watson, *supra* note 28 at 93, n. 7.

86. Halpern, *supra* note 20 at 384-85, 387.

87. See Mosher, *supra* note 22 at 624-25.

88. *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

Justice within three months as the government attempted to salvage the public reputation of Canada's highest court.<sup>89</sup> Ignoring context, whether in *Murdoch* or other cases, ultimately does a disservice to young graduates and the society they serve, as young lawyers are limited in their understanding of the organic interplay between the justice system and the society within which it operates.

Third, the casebook method devotes little time to teaching students about the intricate workings of the institutions of the justice system: courtrooms, administrative tribunals, prisons, parole boards.<sup>90</sup> Deplorably, although now less commonly, some law students graduate without even having seen the inside of a courtroom or tribunal. Furthermore, traditional legal education—focused as it is on legal issues and rules—displays a peculiar blind spot when it comes to admitting the existence of other professionals within the justice system (except, of course, appellate judges). The job descriptions of police officers, court clerks, bailiffs, translators, psychologists, parole officers, among others, are generally overlooked. The upshot is that young graduates experience unnecessary stress navigating new institutions, and must interact with professionals whose job descriptions they initially comprehend in only a hazy manner.

Fourth, the traditional case method may stunt students' understanding of themselves as whole persons. The rigorous emphasis on issue identification and rational analysis in the classroom can devalue "students' more subjective and 'non-rational' qualities,"<sup>91</sup> such as feeling, intuition, and emotion. Some students may conclude that law schools value rational analysis "to the exclusion" of other skills and values.<sup>92</sup> Furthermore, students whose main interests lie in investigating "overarching issues of justice," or the "ideal of service" to the community, may feel alienated by the peripheral treatment of these issues in the traditional law school classroom.<sup>93</sup> A curriculum cannot produce healthy graduates if students feel they must bury or ignore parts of themselves to succeed. Students who cannot acknowledge their own wholeness may also be more judgmental and less tolerant in their dealings with others. Finally, a curriculum which fails to teach students about self-understanding misses a critical opportunity to impart useful knowledge about stress management and civility. Young lawyers and the society they serve lose out.

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89. Robert Remington, "Revisiting the Court's Key Cases: *Murdoch* Decision" *The National Post* (6 April 2000) B4; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992).

90. Maranville, *supra* note 39 at 56.

91. "What we're not telling law students," *supra* note 84 at 24.

92. Floyd, *supra* note 33 at 1-2.

93. Maranville, *supra* note 39 at 53-54.

The capacity to identify—to fit realities into categories—is a necessary lawyering skill. A curriculum dominated by identification skills, however, may create a dangerous learning environment: students practising identification skills may develop a more ubiquitous “impulse toward categorization.”<sup>94</sup> The impulse to categorize can dominate thinking at large, creating a learning handicap for law students when faced with areas of knowledge in which flexible, creative thinking is required. Therein lies the peril of a curriculum founded primarily on identification skills.

## 2. *Foundational criticism in a broader context and the medical school example*

Janet Mosher notes that all professions have “boxes ... through which clients’ or patients’ lives are organized and interpreted.”<sup>95</sup> In fact, traditional academic disciplines of all kinds, including but not limited to the professional schools, favour an approach to teaching focused on identification. As such, the foundational critique of legal education is fundamentally consistent with a larger body of criticism aimed at traditional academics in general. Foundational critics have variously described traditional education as “mechanistic ... indoctrination”<sup>96</sup> and “Cartesian ... madness,”<sup>97</sup> due to its primary reliance on identification. Teachers impart “methodology, information and control”; students learn to reduce “worlds” to “systems, particulars to categories” and “realities to abstractions.”<sup>98</sup> The “entertainment of doubt”—which, in the words of John Ralston Saul, is “central to understanding”<sup>99</sup>—remains a distant speck on the curricular horizon, rarely addressed in the classroom at all. Students of all subjects, not just law, end up with comprehension of merely cosmetic depth in their study of choice.

An area of education which has received extensive attention from foundational critics is the traditional medical school curriculum. The critique of the medical curriculum is of interest to us in the legal context, in part because the foundations of medical and legal education share so much in common. Law students are taught to identify legal issues by gathering appropriate facts, and to match corresponding statutory rules or caselaw to resolve the issues. Similarly, medical students are taught to identify

94. Peter Shane, “Why are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education” (1990) Iowa L. Rev. 1033 at 1036.

95. Mosher, *supra* note 22 at 628, n. 30.

96. Victor Frankl, *The Will to Meaning: Foundations and Applications of Logotherapy* (New York: Meridian Books, 1988) at 85.

97. Oliver Sacks, *Awakenings* (New York: Vintage Books, 1999) at 228.

98. John R. Saul, *The Doubter’s Companion: A Dictionary of Aggressive Common Sense* (Toronto: Penguin Books, 1995) at 177-78; Sacks, *ibid*.

99. Saul, *ibid*.

diseases by amassing evidence of signs and symptoms, and to match the correlating requisite treatment to the disease diagnosis.<sup>100</sup> Dr. Oliver Sacks has argued that the “identification” medical students learn is “essentially legal in nature,” and notes that the same term—“case”—is used in both medicine and law.<sup>101</sup> One may argue with equal persuasiveness that the identification law students learn is essentially medical in nature, so similar are the modes of analysis taught to the two groups of students. The identification-heavy core of both the medical and legal curricula places law and medicine within typical educational constraints: identification remains the prized aspect of learning.

Foundational critics of the medical curriculum describe students’ flat understanding of their subject just as foundational critics of legal education do. Dr. Majid Ali, a strong critic of the traditional medical curriculum, has even described the preoccupation with disease and drug categories in medical education as an illness itself, calling it “boxosis.”<sup>102</sup> Perhaps unsurprisingly, the areas in which medical students often display insufficient understanding are fundamentally very similar to areas in which law students show underdeveloped comprehension. Students of medicine frequently learn diagnostic procedures and drug treatments at the expense of learning to show sympathy, respect, and consideration for the patient.<sup>103</sup> Medical students may also develop a sense of “professional apartness and superiority,” which prevents meaningful communication between doctors and patients,<sup>104</sup> and which is ultimately similar to law students’ sense of apartness from clients.

Furthermore, traditional medical education supplies students with insufficient understanding of the broader social context within which medicine operates. Persuasive and abundant research exists documenting the positive effects of social networks, good nutrition, religious or spiritual affiliations, and stress management on the health of individuals—in short, the healing value of a society bent on balanced living.<sup>105</sup> Medical students,

100. See Sacks, *supra* note 97 at 226, n. 105.

101. *Ibid.*

102. Majid Ali, *The Cortical Monkey and Healing* (Bloomfield, N.J.: Institute of Preventive Medicine, 1989).

103. Studies suggest doctors are less willing to listen to their patients at the end of their medical training than they were at the beginning: see June Callwood, “The Lawyer as Citizen” (Symposium on Access to Justice for a New Century: The Way Forward, Toronto Marriott Eaton Centre, 28 May 2003) *Ontario Lawyers’ Gazette* 7:4 (2003) 6 at 9. See also Sacks, *supra* note 97 at 226, n. 105; Andrew Weil, *Spontaneous Healing* (New York: Ballantine Books, 1995).

104. Sacks, *supra* note 97 at 225, n. 104.

105. See generally Robert Ornstein & David Sobel, *The Healing Brain: Breakthrough Discoveries About How the Brain Keeps Us Healthy* (Cambridge, MA: Malor Books, 1987, 1999); John Kabat-Zinn, *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain, and Illness* (New York: Delta, 1990).

meanwhile, learn little about the interplay between their role as healers and the broader social context, just as law students learn little about the interplay between law and the broader society.

Finally, the traditional medical curriculum does not encourage students to develop the self-understanding they need to succeed as compassionate professionals. According to Dr. Andrew Weil, the “clinical training of doctors remains a brutal initiation that makes it very difficult for students to maintain healthy lifestyles and develop the mental and spiritual qualities of healers.”<sup>106</sup> While medical students are not learning to become healers, law students are not learning to become instruments of justice. The traditional legal curriculum also leaves little time for the cultivation of self-knowledge.

In comparing the shortcomings of traditional medical and legal education, my aim is to illustrate that similar educational foundations—even in two seemingly unrelated disciplines—can predict corresponding curricular weak spots. In short, the medical school-law school comparison provides evidence of the powerfully interdisciplinary nature of the foundational critique itself. I offer the comparative critique, however, not just because the foundations and weak points of law school and medical school have so much in common. Foundational critique is truly valuable only if we suggest alternative curricular foundations as a way forward. Foundational critics in the medical context have produced original and groundbreaking work outlining alternative foundations for the medical curriculum. Luckily for us in the legal field, the work of Dr. Oliver Sacks in the medical context can provide an excellent starting point for rethinking law school’s foundations.

III. *Twin foundations of identification and understanding: a way forward*  
In his remarkable book *Awakenings*, neurologist Oliver Sacks chronicles his work with patients suffering from severe Parkinsonian-like symptoms at the Mount Carmel institution in New York. Dr. Sacks administered the drug L-Dopa to his patients on an experimental basis, with dramatic, if unpredictable, results. Dr. Sacks’s book is not only a chronicle of his work with his patients, however; it is also a philosophical probe into the nature of medicine and illness. While discussing the metaphysical aspects of a patient’s journey through illness, Dr. Sacks muses on the insufficiency of a medical system devoted primarily to the identification of disease. He then offers an alternative set of foundations for medical education and

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106. Weil, *supra* note 103 at 341-42.

medical practice, in which *identification* and *understanding* co-exist as two complementary, foundational “modes of clinical approach.”<sup>107</sup>

For Dr. Sacks, identification is the traditional—and necessary—“mechanical and technological medicine” of disease diagnosis and treatment. Understanding, meanwhile, is the ability of the physician to “care wisely” for his patient.<sup>108</sup> The physician becomes

a fellow traveler, a fellow explorer, continually moving *with* his patients ... Such an approach is neither ‘subjective’ nor ‘objective’; it is (in Rosenstock-Huessy’s term) ‘*trajective*’ ... [The physician] must feel (or imagine) how his patient is feeling, without ever losing the sense of himself; he must inhabit, simultaneously, two frames of reference, and make it possible for the patient to do likewise.<sup>109</sup>

Within the alternative foundational framework Sacks proposes, understanding essentially means intelligent, compassionate patient care. Sacks himself, however, displays an evolved understanding of *several* issues typically under-emphasized in the traditional medical curriculum, including, but not limited to, the doctor-patient relationship. For instance, Sacks comprehends the role of medicine in a broader social context. “The disease-the man-the world go together,” he writes, “and cannot be considered separately as things-in-themselves.”<sup>110</sup> Sacks also respects the importance of care-givers other than doctors in patients’ lives. By attuning to the movements of a “sensitive nurse,” a friend, or even a friendly dog, Sacks writes, his patients—normally “totally immobilized by Parkinsonism, dystonias, contortions”—enjoy the transient ability to move with grace and intuitive control.<sup>111</sup> Finally, Sacks exhibits profound self-understanding. As a youth, Sacks was “torn between two passionate, conflicting interests and ambitions—the pursuit of science and the pursuit of art.” By becoming both scientifically rigorous and intuitively sensitive—by becoming a physician artist—Sacks was able to give “full expression to both sides” of his nature, thus balancing his spirit and laying the necessary groundwork for a truly meaningful career.<sup>112</sup>

Dr. Sacks’s alternative foundations for medical education—identification and understanding—provide a tremendously useful springboard for rethinking the foundations of legal education. Drawing inspiration from Sacks, I suggest that identification and understanding

107. Sacks, *supra* note 97 at 226, n. 105.

108. *Ibid.* at 226-27.

109. *Ibid.* at 225-26, n. 104.

110. *Ibid.* at 229.

111. *Ibid.* at 348-49.

112. *Ibid.* at 287.



become the twin foundations of a re-invigorated legal curriculum. Such foundations show promise for a number of reasons. First, a framework with dual foundations could address the roots of the curricular imbalance in today's legal curriculum. Today, identification skills are the central focus of law school, monopolizing the curricular limelight while everything else—clinic work, advocacy skills, perspectives courses—is relegated to a walk-on part on the curricular stage. A more balanced education could result, however, if understanding was attributed equal weight to identification on the foundation block.

Second, a framework with dual foundations of identification and understanding would prevent the proscription of identification skills to the curricular hinterland. In the medical context, Dr. Sacks respects the importance of identification skills, and pleads for a framework in which identification and understanding exist as complementary approaches.<sup>113</sup> Similarly, identification skills are an essential part of lawyering; they encourage students to develop clear, logical thinking, and should be taught in the legal curriculum to complement issues of understanding. Teaching identification skills properly requires patience and effort on the part of professors. Methodical and mindful teaching of analytic skills is far preferable to the unanimated information delivery which has come to characterize many large law school lectures today. Happily, rigorous teaching of analytic skills should significantly alleviate concerns that incorporating another foundation into legal education would prevent students from graduating with sound identification skills.

Finally, identification and understanding are both foundations with the requisite weight and import needed to function as an architectural base upon which to build an entire curriculum. While many foundational critics have argued that law schools need to "reformulate" their "aspirations," including the "purposes that guide them,"<sup>114</sup> in the main, legal scholars have not elucidated workable alternative foundations as well-formulated as that proposed by Dr. Sacks in the medical context. Chris Iijima, for example, has aptly argued that law schools today are "too enamored" with identification skills, but proposes an alternative curricular vision in which no less than ten qualities must "interact" to form the basis of the curriculum.<sup>115</sup> Although Iijima's ideas have merit, his proposal lacks

113. Sacks, *supra* note 97 at 226-27, n. 105.

114. Trakman, *supra* note 49.

115. The ten qualities are analysis, intuition, creativity, common sense, organization, emotional perspective, intellectual perspective, cultural insight, political insight and compassion: Chris Iijima, "Four Distinctions and a Pet Peeve" *The Law Teacher* (Fall 2002), online: Law Teacher Online <<http://law.gonzaga.edu/Programs/institute+for+law+school+teaching/The+Law+Teacher+-+Newsletter/Past+Issues+of+The+Law+Teacher/fall+2002/default.htm>>.

the cohesion needed to implement it in practice. Other foundational critics, meanwhile, have pinned their hopes on experiential education as the additional curricular foundation needed to balance the current over-emphasis on identification.<sup>116</sup> It is true that clinic work and other experiential exercises fill gaps in student learning caused by the current curriculum. Unless a law school consciously iterates specific goals for its experiential programs, however, clinical education may be “permeated by the same vision of law and lawyering that informs [traditional] classroom instruction.”<sup>117</sup> For example, students unschooled in client understanding may try to manipulate or control the clinic’s clients.<sup>118</sup> Teachers operating in the clinical context, meanwhile, may decide to grade students primarily on their ability to spot issues in clients’ cases.<sup>119</sup> That is, clinic work can become a mere extension of the existing curriculum.

#### *IV. Imagining a re-invigorated curriculum: building on the foundation of understanding*

I do not claim to have the last word on successful curricular change. As I outlined in the introduction, my aim in writing this article is to catalyze much-needed discussions on the meaning of quality in legal education. I do have a vision of quality legal education, however, which I outline presently. Specifically, I envision a law school curriculum in which the foundations of identification and understanding are attributed equal weight. From first year through to third, students’ grades would reflect, in equal measure, their mastery of identification skills and their command of various concepts of understanding. Building on the foundation of identification, professors could reaffirm their commitment to teaching analytic skills, using guided hypotheticals with students throughout the semester, but de-emphasizing the current trend towards coverage teaching.

The foundation of understanding, meanwhile, offers a smooth new surface upon which to build. I suggest building on the foundation of understanding by exploring the four key areas in which students of the traditional curriculum show weakness: client understanding; comprehension of law in a broader context; understanding of the actors and institutions of the justice system; and self-knowledge. In the spirit of the architectural metaphor, each topic can be thought of as one of four pillars rising from the new foundation. Presently, I examine the benefits

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116. See Angela McCaffrey, “The Healing Presence of Clients in Law School” (2003) 30 Wm. Mitchell L. Rev. 87; Edwards, *supra* note 32; Maranville, *supra* note 39; Mosher, *supra* note 22.

117. Mosher, *ibid.* at 634.

118. *Ibid.*

119. See Robert J. Condlin, “Tastes Great, Less Filling: The Law School Clinic and Political Critique” (1986) 36 J. Legal Educ. 45.

of teaching each topic in law school. I refer to Dr. Sacks's conceptions of understanding in the medical context when appropriate, and offer practical teaching ideas related to each key topic.

### 1. *Client understanding*

Dr. Sacks's trajectory approach to the physician-patient relationship is a good starting point for legal educators seeking to make client understanding a central part of the law school curriculum. Sacks suggests the physician become a fellow explorer of the patient's experience. In the legal context, it is equally useful for lawyers to be fellow explorers of their clients' experiences. Like patients who are ill, clients with legal problems also suffer anxiety: clients may be under emotional or financial strain; some have no prior experience navigating the justice system. Law students aware of various aspects of the client experience will, upon graduation, be significantly better prepared to anticipate client needs.

Legal clinics, now present in nearly all Canadian law schools, provide students with an excellent avenue to explore the client experience. Clinic work best helps students in this regard when students are expressly encouraged to think about events from the client's perspective at various intervals during the semester. The reflective exercise, described by Kim Connolly of the University of South Carolina School of Law in her work with students at an environmental law clinic, is a particularly beneficial assignment. Connolly asked students to reflect in writing on their initial client interviews at the clinic, and consider the event from the client's perspective.<sup>120</sup> One student wrote an amusing haiku chronicling his failure to offer his client a drink of water during the long interview.<sup>121</sup>

Classroom opportunities also exist to teach students awareness of the client experience. Teachers may ask students who feel comfortable to describe in class a legal episode in their personal history, such as being part of a landlord/tenant dispute.<sup>122</sup> Teachers may explore simulation exercises in which students role-play clients.<sup>123</sup> Law and Literature courses provide the opportunity to study the responses of characters caught in legal

120. Connolly, *supra* note 79.

121. Talking rapidly

A drink of water for her

Would have been real nice.

See Connolly, *ibid.*

122. Sirico, *supra* note 82.

123. John Capowski, "Values and Lawyering Skills" *The Law Teacher* (Spring 2001), online: Law Teacher Online <<http://law.gonzaga.edu/Programs/institute+for+law+school+teaching/The+Law+Teacher+-+Newsletter/Past+Issues+of+The+Law+Teacher/spring+2001/default.htm>>.

disputes as portrayed in novels and plays.<sup>124</sup> Finally, professors may invite members of the public who have been involved with the justice system to speak to students about their experiences.

Returning to the physician-patient relationship, Dr. Sacks suggests that doctors respect the “implicit, unconscious knowledge” of illness that a suffering patient possesses.<sup>125</sup> Just as an ill patient has intuitive knowledge of illness and treatment success, a client may have intuitive knowledge of a legal problem and a legal remedy’s efficacy—after all, the client experiences the problem and the remedy first-hand. Teaching law students to respect this client experience is paramount if law schools are to play a role in changing the current lawyerly habit of “suppress[ing] the voice and agency of the persons [lawyers] purport to ‘represent’.”<sup>126</sup> Teaching respect for the client experience includes teaching future lawyers humility regarding the efficacy of the justice system: the legal avenue is not a panacea for problem solving. In certain cases, a legal approach may not be the best way to solve a client’s problem. In other situations, the reality of scarce resources and overloaded dockets means students must learn about the positive and negative aspects of pursuing settlement.<sup>127</sup> Finally, sometimes the strains of proceeding through the legal process may outweigh the benefits of favourable judgment. For example, Rosa Becker won a judgment at the Supreme Court for half the proceeds of the farm she and her ex-partner had worked equally.<sup>128</sup> Some years after Rosa Becker won her case, however, she committed suicide, leaving a note indicating massive frustration over her inability to collect the money the Court held was her due.<sup>129</sup> Dewlin Vriend won a discrimination suit on the basis of sexual orientation at the Supreme Court,<sup>130</sup> but the media attention associated with the suit proved exceptionally stressful for Vriend. He ended his relationship with his same-sex partner and left the country.<sup>131</sup>

Students who learn client understanding will not only better gauge client needs, they may also engage in more ethical lawyering. If two people, A and B, are in a relationship (as lawyer and client are), the

124. See generally Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995); Veronica Henderson, “The School Bus to Wilkie and The Walk to Colonus: Latimer, Antigone, and the Role for Mercy in Sentencing” (2002) 14 Windsor Rev. Legal Soc. Issues 33.

125. Sacks, *supra* note 97 at 343-44, 384, n. 173.

126. Mosher, *supra* note 22 at 616.

127. See Julie Macfarlane, “Why Do People Settle?” (2001) 46 McGill L. J. 663.

128. *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

129. See Jamie Cameron, “Dickson’s Law: ‘Manifestly One of the Humanities’” (2005) 55 U.T.L.J. 93.

130. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

131. James Cudmore, “The Flames of Hatred Were Roaring” *The National Post* (6 April 2000) B5.

more A depersonalizes B, the less likely A is to make ethical decisions regarding B.<sup>132</sup> If, however, A feels “bonded by their common humanity” with B (more likely to happen if A is taught to understand and respect B’s experiences while A is in school) the likelihood of ethical behaviour increases.<sup>133</sup> Students who learn about client understanding may also be happier. Students drawn to study law because of an interest in “seeing human nature played out in different situations”<sup>134</sup> may feel left out of a curriculum devoted heavily to analytic skills. Systematically incorporating client understanding into the curriculum may help these students maintain eagerness to learn, from first year through to third. Meanwhile, students more comfortable with abstract ideas and identification exercises would also benefit from a curriculum encouraging client understanding. It is the lawyer possessing “the package” of technical and people skills who is better able to attract and retain clients.<sup>135</sup>

## 2. *Understanding the law in a broader context*

Law students, like medical students, learn to solve problems, but these problems do not sprout in a vacuum. Legal and medical predicaments exist within the context of the larger society, and are ultimately part of the world. While Dr. Sacks writes “the disease-the man-the world go together,”<sup>136</sup> the formula is also true in the legal context. The legal problem-the client-the world go together; lawyers who understand this invariably approach the legal problem—and their clients—with greater sophistication.

In the medical context, Dr. Sacks has observed that disease can have a “microcosmic” character: that is, the world of an illness can express the larger world within which it exists. We need only consider the example of increasing stress- and obesity-related illnesses in our fast-paced, fast-food society to grasp Sacks’s concept of “worlds which express worlds.”<sup>137</sup> Like the world of illness, the world of the legal problem is also microcosmic in character. For example, the incidence of violent crime against women may reflect the value, or lack thereof, women are ascribed in the broader society in question. Within the traditional legal curriculum, however, the legal problem in a case is “assessed and understood within a context whose outermost boundaries are those drawn by the particular client’s life.”<sup>138</sup> Traditional courses do not encourage students to ask questions like ‘Who else has this legal problem?’ It has remained largely the purview

132. Interview of Margaret Sommerville by Paul Kennedy (2003) re “The Culture of Pain” on *Ideas*, CBC Radio One, Toronto.

133. Callwood, *supra* note 103.

134. Jeannie Marshall, “Literature for Lawyers” *The National Post* (18 February 2003) AL6.

135. Joyce Rowlands, “Soft Skills Give Hard Edge” *The Globe and Mail* (9 June 2004) C8.

136. Sacks, *supra* note 97 at 229.

137. *Ibid.*

138. Mosher, *supra* note 22 at 616.

of perspectives courses to teach students how legal problems can reflect broader social, economic, or political structures in society. As I have argued above, perspectives courses have not yet had a transformational effect on the curriculum as a whole. A concerted effort to make understanding of the law in a broader context a central pillar rising from the new curricular foundation could be the needed catalyst to give the ideas disseminated by perspectives scholars the weight and authority they deserve.

Teaching students about the microcosmic nature of the legal problem in all law school classes could instill graduates with a consciousness of the organic interplay between their society and its legal problems. Several opportunities exist in both clinic and classroom to transmit such understanding. In the clinical context, M.P. Treuhart has placed law students with non-profit organizations helping low-income women and girls, thus teaching students about the interplay between legal and social problems faced by women and girls.<sup>139</sup> In the classroom, meanwhile, professors could explore how social, political, and economic forces are reflected in the legal problems, and the law-making, of the day.<sup>140</sup> It may also be worthwhile to push beyond the notion of law as microcosm. The Rt. Hon. Kim Campbell has noted that while the law may be a reflection of the country in which it exists, domestic laws can themselves catalyze change in the world on an international scale. For instance, a domestic sexual assault law can help energize a social movement for women's equality a continent away, and may ultimately change international law on the subject.<sup>141</sup>

Law students could also benefit from contextual thinking in legal ethics classes. Many law schools and bar schools continue to teach legal ethics in the same way that other courses are taught. Students learn to identify the ethical issue in a hypothetical set of facts. They locate the appropriate *Rule of Professional Conduct* which applies to resolve the ethical problem.<sup>142</sup> Students taught legal ethics in this manner come away obediently reciting *Rules of Professional Conduct* by rote, floundering when the *Rules* fail to provide a clear-cut answer to a particularly thorny ethical problem. While matching *Rules* to hypothetical ethical issues may be a tidy, easily gradable exercise for the classroom, in reality, legal ethics is "not an exact science, with every problem amenable to

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139. See Maranville, *supra* note 39 at 66.

140. Lecturers could, for example, teach students how social movement actors influence law-making: Mosher, *supra* note 22 at 632.

141. Campbell, *supra* note 81.

142. Buckingham, *supra* note 16 at paras. 3, 11, 32.

a set and indisputable resolution.”<sup>143</sup> Some law professors have already made efforts to broaden the context of legal ethics teaching beyond the traditional transmission and application of rules. Trudo Lemmens of the University of Toronto Faculty of Law has incorporated discussions of the moral, religious, and philosophical issues of the day into his legal ethics seminar. Julie Macfarlane of the University of Windsor Faculty of Law supports the exploration of ethical issues outside the traditional classroom lecture, in the context of experiential education.<sup>144</sup> A more widespread effort to broaden the context of legal ethics classes could increase the likelihood that students develop an ethical state of mind above and beyond memorizing the *Rules*. If the incorporation of contextual teaching means ethics courses are expanded, all the better; “more than a generation” of law students has received “no or uninspired instruction on the vital subject of legal ethics.”<sup>145</sup>

Finally, interdisciplinary studies can provide students with insights into the broader context within which the law operates. Over the past decade or so, law schools have made efforts to integrate their programs more successfully into “the wider university.”<sup>146</sup> For example, law faculties now hire more professors with doctoral degrees in a range of disciplines; students may register for combined law-M.B.A. or law-M.A. degrees; the law school syllabus may offer courses like Law and Literature, Law and Psychology, or even Law and Medicine. Like perspectives courses, however, interdisciplinary courses are upper-year electives, which may be perceived as “luxuries” or fun and easy reprieves from “bread-and-butter” doctrinal courses.<sup>147</sup> Law schools need to convey more strongly to students the beneficial impact a thorough interdisciplinary education can have on their future as lawyers. One way to send that message is to include interdisciplinary analysis in all courses, not just upper-year electives. In a criminal law class, for example, a professor could illustrate how lawyers can benefit from the advice of colleagues in the field of

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143. Michel Proulx, Ruth Enns & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 2-3.

144. Macfarlane, “A Feminist Perspective”, *supra* note 21 at 381.

145. Kent Roach, “Book Review of: *Ethics and Canadian Criminal Law* by Michel Proulx, Ruth Enns & David Layton,” (2003) 47 *Crim.L.Q.* 224 at 225; see also Rodgers, *supra* note 8; Watson, *supra* note 28 at 92; Buckingham, *supra* note 16 at para. 7.

146. Backhouse, *supra* note 2.

147. Buckingham, *supra* note 16 at para. 22. One student in a Law and Literature class at the University of Alberta Faculty of Law considered the course a “last chance” to read the literary classics before embarking upon his profession, which, his comments implied, would leave little time for blithesome pursuits like reading literature: Marshall, *supra* note 134 at AL6.

psychology before embarking on a particular course of action.<sup>148</sup> Since students come to law school with varied educational backgrounds—some hold a traditional B.A. in Political Science, but others have music, art, or engineering degrees—interdisciplinary work could also instill students with a sense that their prior education still matters, in turn improving student morale and self-esteem.

### 3. *Understanding the institutions and actors of the justice system*

Students come to professional schools with vastly different levels of experience with the actors and institutions of their chosen profession. Here Dr. Sacks proves a useful autobiographical example. Young Oliver Sacks had the good fortune to have an uncle who was a chemist and encouraged Sacks to experiment with chemical materials. Sacks's father, meanwhile, was a physician, and frequently took his son along for Sunday morning house calls.<sup>149</sup> Through these family ties, Oliver Sacks was able to observe scientists in action. He developed, at a precocious age, a respect for scientists and their theatres of work; this respect threads through works like *Awakenings*. Although some students today come to law school having experienced the guidance of friends and family working in law, many other students will have had little or no prior contact with the justice system.

Unfortunately, the traditional legal curriculum spends little time exposing students either to the intricate workings of juridical bodies, like courts and boards, or to the institutions that give rise to legal disputes, like banks, corporations, or labour unions.<sup>150</sup> That young lawyers want this knowledge, however, is evidenced by high demand for associate training programs in which law firms teach new recruits the basics of running a meeting, arguing a motion, or dealing with a board of directors.<sup>151</sup> Law schools could ease students' transition into the workforce by familiarizing them with the institutions of the justice system before graduation. Students would likely find courses with an "explicit institutional focus" stimulating

148. There are key psychological aspects to keep in mind when organizing a police lineup: A.M. Levi, "Some Facts Lawyers Need to Know About the Police Lineup" (2002) 46:2 Crim. L.Q. 176. Canada's Supreme Court could have better achieved its objective of limiting the psychological-blow automatism defence had the judges noted that current scientific evidence in the canons of empirical psychology does not support the defence in a majority of cases: James Livingston & Simon Verdun-Jones, "Sidebar Psychology: Discussing and Challenging the Defense of Psychological-Blow Automatism" (2002) 47 Crim. L.Q. 79.

149. Dr. Sacks reminisces about his influential childhood experiences with science and scientists in his biography *Uncle Tungsten: Memories of a Chemical Boyhood* (New York: Alfred A. Knopf, 2001).

150. See Maranville, *supra* note 39 at 56.

151. See Virginia Galt, "Lawyers nurture their own as never before" *The Globe and Mail* (9 June 2004) C1, C8.



and relevant,<sup>152</sup> and the creative professor does not lack ways to incorporate such knowledge into the course syllabus. On the experiential side, teachers may plan jail tours, police ride-alongs, or student trips to observe a local motions court calendar.<sup>153</sup> A highlight of my own legal education was a trial court tour in which my professor, Justice David Cole, encouraged me to spend a little time in an empty holding cell. On the classroom side, law professors could draw inspiration from their counterparts in business schools, who teach classes about the operation of “power and influence” within various organizations and institutions.<sup>154</sup> Finally, students may discuss what distinguishes well-organized institutions from poorly functioning ones. In the medical context, Dr. Sacks has noted that a hospital can either provide therapeutic hospitality to long-term patients, or function as a cold institution which deprives patients of their sense of reality and home.<sup>155</sup> In the legal context, institutions function beneficially or detrimentally also. The prison, for instance, can discourage or encourage inmate recidivism, depending on resource allocation and manageability of staff workload.

Students’ levels of exposure to the actors of the justice system before entering law school is also varied. In traditional legal education, however, students are primarily in contact with law professors. Introducing students to the day-to-day tasks of practising lawyers, judges, investigators, and administrators could create graduates who make a smoother transition into professional life. In addition, the more students know about the complexity and challenge of their future colleagues’ work, the more likely they are to treat these colleagues with respect. Much has been written recently about decreased civility in society and among justice system actors in particular.<sup>156</sup> Finally, exposing students to the various actors of the justice system may point students towards career choices best suited to their individual interests.

In practice, law schools can pursue a number of initiatives to expose students to justice system actors. The University of Toronto Faculty of Law Career Development Office has organized career panels in which students meet graduates practicing in “non-traditional” areas of law—public interest law, management consulting, environmental law.<sup>157</sup> While

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152. Gulati, Sander & Sockloskie, *supra* note 14 at 265.

153. Maranville, *supra* note 39 at 58, 64, 66.

154. Gulati, Sander & Sockloskie, *supra* note 14 at 265.

155. Sacks, *supra* note 97 at 272.

156. Gibb-Clark, *supra* note 64 at M1; Address, “Keep It Civil: How to Maintain Your Civility in an Uncivilized World” (Advocates’ Society of Ontario, Toronto, Canada, April 24, 2003).

157. Bonnie Goldberg, “Career Development Office, The Next Five Years: Focus on Alternative and Public Interest Careers” *Nexus* (Spring 2002) at 94.

panels are a good start, professor-mediated discussion may allow for more pointed treatment of topics. For instance, a professor may ask lawyers to tell students how amenable their area of practice is to work-family balance, serving to fill the existing void of such practical information within the traditional curriculum. While lawyers and judges currently do receive some speaking invitations from law schools, students rarely get to hear from mediators, court clerks, police officers, or prison guards about their jobs. These professionals would likely welcome the opportunity to speak in the law school environment. When it is not possible to arrange in-person visits, professors may rely on electronic media such as chat groups to facilitate student dialogue with professionals.<sup>158</sup> Alternatively, professors may rely on biography to humanize the work of justice system actors. There is no shortage of judicial actors with colourful histories. Justice Albie Sachs of South Africa, for example, has a life story with enough drama to interest the most laconic law student. He has been jailed, exiled, and narrowly escaped death in a car bomb explosion in his fight against apartheid.<sup>159</sup> Stories like his can enliven the classroom and provide inspiration to students.

#### 4. *Understanding yourself: in law school and beyond*

Students come to law school with differing levels of self-awareness,<sup>160</sup> but the traditional curriculum rarely helps students become more reflective, self-aware practitioners.<sup>161</sup> The quest for greater self-awareness is, however, one of life's fundamental journeys; furthermore, professionals have the good fortune and opportunity to develop self-knowledge while engaged in challenging, complex work. Dr. Sacks, for example, comments on his own evolution while working with patients at Mount Carmel. That experience made him "older and more battered, but calmer and deeper."<sup>162</sup> In the film adaptation of *Awakenings*, the doctor character based on Sacks also evolves, "from being a little academic, a little withdrawn at first, to intensely and humanly concerned for his patients."<sup>163</sup> While a lifetime of work is often needed to attain the self-awareness exhibited by a professional like Sacks, there is every reason to believe that exposing students to questions of self-knowledge at the front-end of their careers—

158. See Floyd, *supra* note 33.

159. See interview by H. Kreisler with Albie Sachs (2 February 1998), online: Conversations with History Online <<http://globetrotter.berkeley.edu/Sachs/sachs-con0.html>>; Albie Sachs, *The Soft Vengeance of a Freedom Fighter* (Berkeley: University of California Press, 2000).

160. See generally Floyd, *supra* note 33.

161. See Connolly, *supra* note 79.

162. Sacks, *supra* note 97 at 274.

163. *Ibid.* at 374.

in law school—will sow seeds for deeper reflection later in life, and may encourage a lifelong commitment to service and engaged citizenship.

At a minimum, a self-aware lawyer knows her strengths and weaknesses as they relate to legal work. Teaching and grading identification skills properly throughout law school could significantly help students pinpoint their strengths and weaknesses in this one area, but students ultimately need feedback on a wide variety of legal skills. Currently, some upper-year courses do grade students on skills other than issue-spotting—skills such as essay-format legal writing, or advocacy, for example. Broadening curricular foundations to include both identification and understanding, however, could spur the formation of a truly comprehensive curriculum. Professors would teach a wide array of legal skills to match students' wide array of aptitudes. Students exposed to, and graded on, a wide variety of legal skills in school would be better able to pursue a specialization suited to their abilities. They would also likely end up happier. According to psychologist Martin Seligman, attaining happiness at work relates directly to how often the worker uses his or her "signature strengths" in the workplace.<sup>164</sup>

Another way to teach students self-knowledge is to explore the area of behavioural stress response. Law is a high-stress profession, characterized by a large volume of work, intense billable hours, and high-stakes issues. Lawyers frequently report feeling distressed, overwhelmed, and in constant "crisis mode,"<sup>165</sup> putting themselves at elevated risk for burnout and physical illness. Young lawyers are particularly at risk for burnout, since their working environment frequently combines the dangerous mix of high job demands and low decision-making authority.<sup>166</sup> Good stress-management skills, meanwhile, can make a difference in lawyers' overall career success. A study of Canada's top twenty-five female private sector lawyers showed these women tolerated stress better than their peers, by implementing strategies including sound time management and organization, assertive communication, exercise, minimized commuting, and strong affiliative connections with supportive spouses.<sup>167</sup>

Law school is an ideal place for students to discuss stress-management issues. Students deserve a heads-up in law school about toxic legal workplaces that place unreasonable demands on associates. They should

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164. Seligman, *supra* note 43 at 176.

165. Gibb-Clark, *supra* note 64 at M1.

166. See Seligman, *supra* note 43 at 180.

167. Taylor & Willson, *supra* note 50 at 75, 86. But see Crittenden, *supra* note 64 at 235.

be encouraged to consider leaving if that is the best recourse.<sup>168</sup> Students also deserve to know about courageous lawyers who took up the challenge of organizing more flexible work schedules.<sup>169</sup> Non-traditional students, such as women, minorities, and students with physical disabilities may reap particular benefits from cultivating “stress hardiness”<sup>170</sup> as they aim to break down traditional barriers in the workplace. Where traditional law professors feel unprepared to tackle issues of stress-management with their students, law schools could consider hiring career coaches, or providing students with books such as *The Lawyer’s Guide to Balancing Life and Work*.<sup>171</sup> Ultimately, law schools that prepare students for tough situations likely to arise in practice will see the investment pay off in terms of more successful career navigation by their graduates.

Finally, delving into questions of self-knowledge could include teaching students about commonly held beliefs rooted in stereotype. Given the increased diversity in law schools today, students could benefit from learning how they may face stereotyping in the workplace, or how they may unconsciously engage in stereotyping themselves. The case of women in law is a useful example. Research shows that when people are asked to identify the qualities of a leader, and the qualities of masculinity, significant overlap exists between the two categories, whereas there is “virtually no overlap” between qualities of leadership and qualities of femininity.<sup>172</sup> Both men and women have been shown to share these views on “the masculine construct of leadership,”<sup>173</sup> but women are entering law, a profession that requires leadership competence, in higher and higher numbers. An equally damaging perception career women must battle is the notion that “once a woman is pregnant, her commitment [to her career] is questioned.”<sup>174</sup>

Professors could do a great service to students by making them aware of stereotyping, and providing non-traditional students with techniques

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168. A lawyer at one firm found “an associate crying in her office because her ‘mentor’ instructed her to take her laptop along to her father’s funeral ‘to keep up her billable hours.’ He confronted the mentor, only to be told to deal with it, that is the way things are done here. He bailed.”: Marzena Czamecka, “Law Firm Culture in Lean Times: Musketeers v. Lone Rangers” *Lexpert* (September 2003) 101 at 114.

169. Glater, *supra* note 50; Ann Kerr, “Lawyers trying to slow down the meter” *The Globe and Mail* (5 January 2004) B10.

170. Suzanne C. Kobasa, “Stressful life events, personality, and health: An inquiry into hardiness” (1979) 37 *J. Personality & Soc. Psych.* 1.

171. George W. Kaufman, *The Lawyer’s Guide to Balancing Life and Work: Taking the Stress Out of Success* (Chicago: American Bar Association Press, 1999).

172. See Campbell, *supra* note 81.

173. *Ibid.*

174. Taylor & Willson, *supra* note 50 at 75. See also Sylvia Ann Hewlett, “Executive Women and The Myth of Having It All” (2002) 80 *Harv. Bus. Rev.* 66; Crittenden, *supra* note 64.

to combat stereotyping. Law teachers could address the male construct of leadership in oral advocacy courses, for instance, by guiding female students to develop confident, resonant, and persuasive speaking styles that remain true to the individual, but transmit leadership potential. With respect to balancing work and child-rearing, law schools could invite successful female lawyers who are also mothers into the classroom to give students advice. Canada's top twenty-five female private sector lawyers, for example, advise women with a family to "emphatically declare [themselves] as still being in the game" at work,<sup>175</sup> while career coaches stress the importance of retaining up-to-date skills during a period out of the workforce.<sup>176</sup> The above advice could equally benefit family-oriented men, and can be presented to students of both genders in law school.

Ultimately, teaching students to understand stereotypes non-traditional lawyers face in the workplace can also translate into better client understanding. The graduate who is aware that others may make assumptions about her will better recognize assumptions she may have about clients based on race, class, gender, or disability.<sup>177</sup> An ability to transcend preconceptions makes for more flexible lawyering. The interconnection between the self and the client is one example of how the four categories of understanding I have outlined above—client understanding, comprehension of the law in a broader context, understanding of professionals and institutions, and self-knowledge—work together synergistically to create better lawyering on many levels.

### *Conclusion*

In this article, I have argued in favour of a foundational re-evaluation of the Canadian law school curriculum. I have outlined some key limitations of the traditional curriculum, which is primarily founded on identification skills. I have also offered an alternative foundational structure for law schools, drawing inspiration from Dr. Oliver Sacks's suggestions for change in medical education. Specifically, I have delineated how law schools could use identification and understanding as twin foundations of equal weight on which to build the curriculum of the future. My proposal for change is not, however, intended as a prescription written in stone; rather, the aim is to help re-invigorate discussions of quality in legal education for the future.

Re-invigorating discussions of quality in legal education is a timely endeavour in the current context. Tuition increases at Canadian law schools

175. Taylor & Willson, *ibid.*

176. Lois Frankel, *Nice Girls Don't Get The Corner Office: 101 Unconscious Mistakes Women Make That Sabotage Their Careers* (New York: Warner Business Books, 2004) at 110-12.

177. Capowski, *supra* note 123.

and the popularity of school rank surveys have pushed legal education to be viewed increasingly as a product for sale. Without a concomitant effort to improve the quality of the product, however, Canadian law schools may be headed down the unfortunate road of their American counterparts. The American experience illustrates how increasing tuition without a contemporaneous effort to re-invigorate the curriculum leads to law faculties simply becoming “profit center[s]” for the larger university. The large lecture halls and high student-faculty ratio in many American law schools make law one of the least expensive forms of graduate education in the United States, yet one for which “schools can charge premium tuition” due to high student demand for the program.<sup>178</sup>

A final question: is fundamental change to the law school curriculum even a realistic proposition? Concerned educators and students will naturally be hesitant to endorse discussions to improve curricular quality if they feel these discussions have no practical influence. Skepticism regarding curricular change is not unwarranted. The law is, after all, a profession known for its conservatism. Some legal education critics are pessimistic about the possibility of real change in traditional law schools. In the words of commentators, “[e]stablished professors are too set in their ways, assistant professors must not rock the boat.”<sup>179</sup> Moreover, the current climate of most faculties, in which pressure to publish books and articles looms heavy in the mind of each professor, may discourage professors from pursuing innovative teaching projects. I remain, however, optimistic about the value of discussing the question of quality in legal education. After all, law professors recognize that law goes beyond the confines of issue-spotting techniques taught in school. Professors write about client understanding, discuss the law in a broader context, and probe institutional questions in law journals. They discuss these issues with the public through radio, television, newspaper, and other media forums; professors also have friends and acquaintances who practise law, and can highlight practical issues with which professors may be less familiar. Were law schools to reward teaching innovation as they reward prolific publication, professors would likely feel more confident adopting broader and more creative approaches to teaching. The most fruitful discussions to improve quality in legal education, therefore, will be discussions in which the law school administration also takes part. Law students—and Canadian society—will be grateful for that effort on the part of law schools at this critical juncture in the development of Canadian legal education.

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178. Gulati, Sander & Sockloskie, *supra* note 14 at 261.

179. Watson, *supra* note 28 at 97. See also Halpern, *supra* note 20 at 392-93.

